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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944.

No. 754

IRVING BREITOWICH,
Petitioner,

vs.

MARGARET THARP AND STANDARD PROCESS CORPORATION, A CORPORATION,
Garnishee.

REPLY BRIEF OF PETITIONER, IRVING BREITOWICH, IN SUPPORT OF PETITION FOR CERTIORARI.

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To keep the record straight, and the questions to be decided in the eye of the Court, we reply to the Brief of Margaret Tharp, respondent.

I.

Answering matters in Point I of the brief of respondent Margaret Tharp.

Counsel for Margaret Tharp, respondent, says that only Illinois law is involved, and that this Court is bound

to follow the decisions of State courts as to what constitutes a "wilful and malicious injury to persons or property" and that no construction of Section 17 of the National Bankruptcy Act is involved here (Respondent's Brief 4-5).

We reply here that whether the judgment in question falls within the exception to Section 17 is a Federal question permissible to State courts to decide when such questions arise legitimately as an issue in a State court; but on that question the State court does not have the last say; for if it were so there could be as many varieties of opinions as there are States, and it would no longer be the National Bankruptcy Act; and if such were the law this Court could review no case under the National Bankruptcy Act that a State court might find involved in the issues of some case before it.

The construction of Section 17 of the Bankruptcy Act is not the question raised in the State court, but, what is the *nature* of the liability involved, and the subject matter of the judgment, is the question; that question is not within the exclusive power of the State court to decide, as is evidenced by the review here of *Davis* v. *Aetna Acceptance Corporation*, 293 U. S. 328, which raised the identical question here presented. In that case the discharge in bankruptcy was pleaded to a complaint upon the liability *before* judgment, while here the discharge is pleaded to the liability *after* judgment. The principle is the same, it being the liability that is in question, no matter what form it has assumed.

Davis v. *Aetna Acceptance Co.*, 293 U. S. 328, is a parallel to this case. There the trial court held that the defendant was not actuated by any wilful or malicious in-

tent and the Appellate Court agreed with that finding; but, nevertheless, gave judgment over the discharge in bankruptcy. In this case the trial court found no wilful injury to the plaintiff and held the obligation barred. The Appellate Court agreed with the trial court that there was no wilfulness shown, but nevertheless, as was done by the Appellate Court of Illinois in the *Davis* v. *Aetna Acceptance Co.* case, held that the discharge in bankruptcy did not affect the liability resting in the judgment. In the *Davis* v. *Acceptance Co.* case this Court held that the special findings in the record overcame the general finding and that, there being no wilfulness, there could be no wilful and malicious injury. Here both trial court and the Appellate Court have held there is no wilfulness in this record and likewise the special finding should have been the basis of the judgment, and the discharge should have been held operative. The cases being parallel, this Court should take this case for review.

Counsel for Respondent cite the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, as a supposed authority for his assertion that this Court is bound to follow the decisions of State courts as to whether a complaint states a cause of action for a wilful and malicious injury to the person within the meaning of the National law. Of course, *Erie Railroad Co.* v. *Tompkins* decides no such thing; but what it did decide was that the doctrine of *Swift* v. *Tyson*, 16 Pet. 18, that Federal courts need not follow local law where the question was *a local one*, was erroneous. The rule has no application where the question involves a power of the United States exercised under its constitutional authority. This Court there decided that Congress had no power to declare what should be a right of action in torts so as to bind a state and that to do so would be an invasion of the independence of the states;

but that, where Congress had power delegated to it, the rule was otherwise. This Court there said:

> "Supervision over either the legislative or judicial action of the states is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States" (p. 79).

That the National Bankruptcy Act is not a matter for State courts to adjudicate exclusively, or conclusively upon, must be obvious to all, for the United States Constitution provides that

> "Congress shall have power * * * To establish * * * uniform laws on the subject of bankruptcies throughout the United States" (Art. I, Sec. 8, U. S. Constitution).

The Federal courts therefore have, and take, jurisdiction to protect a bankrupt from the oppression of creditors seeking to enforce liabilities discharged in bankruptcy, whether the cause arises in a Federal court (*Local Loan* v. *Hunt*, 292 U. S. 234), or is first presented in a State court (*Davis* v. *Aetna Acceptance Co.*, 293 U. S. 328).

To follow the ultimate conclusions of State courts in cases involving discharges in bankruptcy would be to yield the jurisdiction of the Federal courts to the states,—the very principle, in reverse, which was adjudicated upon in the *Erie Railroad* v. *Tompkins* case.

In discussing his proposition that this Court must follow the Illinois decisions opposing counsel say (page 6 of Respondent's Brief) that:

> "It must be presumed that the evidence introduced on the trial before the court and jury sustained the charges and allegations contained in the complaint."

This statement has no basis or justification in fact, for the record shows in the judgment order that default was

entered as to *liability*, and that the jury was called to "*assess the plaintiff's damages*" and that the jury was

> " • • • duly elected, tried and sworn well and truly to assess the plaintiff's damages herein and a true assessment render according to the evidence" (Tr. 3-4).

The jury were not required to and did not pass upon the question of liability.

We therefore suggest that the question here presented involves the proper administration of the National Bankruptcy Act, that State courts only pass upon its provisions as they become involved in some local issue and that this court has the last word so as to give uniformity to adjudications in all courts.

II.

Answering matters contained in Point II of the brief of Margaret Tharp, Respondent.

Opposing counsel say that we have urged that the decision in *Reell* v. *Central Ill. Electric & Gas Co.*, 317 Ill. App. 106, is sound law; we do not so contend. We say that that case was erroneously decided: first, because it did not definitely show on which counts, negligence or wilful, the verdict and judgment proceeded (*Currence* v. *Fisher Body*, 54 Ga. App. 457); and, second, the *Reell* case wrongfully indulged the presumption that the judgment rested upon the wilful count, whereas, it should have enforced the rule that the burden is upon the *judgment creditor* to show that the judgment rested upon a liability excepted from a discharge in bankruptcy (*Kreitlein* v. *Ferger*, 238 U. S. 21, 26; *Van Norman* v. *Young*, 228 Ill. 425). What was said in our petition favorable to the decision in the *Reell* case was that there the complaint

charged that the defendant wilfully *caused* its automobile to strike plaintiff, whereas in this case the charge is that the defendant wilfully operated his automobile in disregard of a red light with no allegation that he intended to injure plaintiff or cause her to be struck, but only that the act *resulted* in plaintiff's being struck. What was intended to be conveyed was the idea that there was some justification for the position taken by the jurist who wrote the opinion in the *Reell* case, while the complaint in this case affords none.

Opposing counsel say (Respondent's Brief, page 8), that in the complaint, among other things, it is charged that in "wilful, wanton, and malicious disregard of the safety of plaintiff * * * he ran her down with his car and injured her". The statement is what respondent's counsel wishes he had said, but did not say; the word "malicious" is not in the complaint except once, and then only where it is said there was a *duty* not to "wantonly or maliciously or wilfully injure plaintiff", but the word "maliciously" does not appear in the charge.

The case of *Bartolucci* v. *Falleti,* 382 Ill. 174, is referred to by opposing counsel for definitions of wilful and wanton misconduct. That case was a suit on the Illinois automobile guest statute which provides that a guest can recover only when the driver is guilty of "wilful and wanton" misconduct, and where a judgment on the statute was reversed. It there defined wanton misconduct as having in it "no intent to injure", which means that the finding of the Appellate Court in this case,—that there was only wanton misconduct,—would not support its general judgment that a wilful and malicious injury resulted from conduct in which there is no element of intent. No intent, no wilfulness; no wilfulness, no malice.

Opposing counsel says he relies upon what Judge Dove wrote in the *Reell* case where that jurist is said to have effectually distinguished the *Reell* case from the *Piggly-Wiggly* case; we suggest that the thing that distinguished the complaints in those two cases distinguishes this case from the *Reell* case, namely, the charge of wilful and wanton misconduct is directed to the act of operation of the automobile, which is not the equivalent of a charge of the intentional infliction of an injury.

Counsel for respondent attempts to differentiate *In re Wegner,* 88 Fed. (2d) 899, but the attempt makes it all the more obvious that the Federal courts do not regard an injury caused by wanton misconduct as the equivalent of a wilful and malicious injury for the verdict there was on a wanton count, which was the theory on which the case was cited in our petition.

Counsel for respondent has complained that

> "petitioner has not brought the evidence taken in the original cause in the trial court before this, or any other intermediate court, and his inference from what he presumed the evidence to be, for example, as stated on page 24 of his brief 'that she was not seen by defendant for some reason,' is not justifiable." (Respondent's Brief, page 11.)

We suggest that the record shows there was *no evidence taken* on the issue of *liability,* and this, respondent's counsel well knows for he made the record; but the *innuendo,* he injects is that respondent did not have the burden upon her of presenting a record that would remove all doubt upon which charge,—negligence, wantonness, or wilfulness, the judgment liability was predicated.

Opposing counsel points to the definition of a wilful and malicious injury as expressed in *Tinker* v. *Colwell,*

193 U. S. 473; but the charge contained in the complaint in this case does not fall within that definition for there the definition includes an *intentional act* which "necessarily" caused injury and not one which might, or probably might, cause injury, which distinguishes wilful and wanton misconduct.

Opposing counsel for respondent cites and quotes from *Robeson* v. *Greyhound Lines, Inc.*, 257 Ill. App. 278 (Respondent's Brief, page 12) to show that acts there alleged were sufficient to charge wilful and wanton misconduct; but we point out the charge made by plaintiff in that case was

> "the operator of the motorbus wilfully and wantonly ran the same into her automobile causing the injuries complained of" (Respondent's Brief, page 12),

which is a direct charge of an act with volition, and which differentiates it from the case at bar. As that case expresses the charge it was the *injury* that resulted from the collision.

The case of *District of Columbia* v. *Colts*, 282 U. S. 63, is not in point here; the law there in question makes reckless driving a crime, as is the case in most of the states. But the Bankruptcy Act does not exempt a judgment based upon wanton misconduct or reckless driving from the effect of a discharge in bankruptcy (*Rogers* v. *Doody*, 119 Conn. 532; *In re Wegner*, 88 Fed. (2d) 899).

Opposing counsel says that he has "demonstrated" that the Illinois cases are in harmony with those of the Federal courts and other Appellate courts; but we point out that the decision of the Appellate Court of Illinois in this case is in direct conflict with *Rogers* v. *Doody*, 119 Conn. 532, and *In re Wegner*, 88 Fed. (2d) 899, as to a

wanton liability being dischargeable; and with *Currence* v. *Fisher Body,* 54 Ga. App. 457, on the question as to which count the judgment is presumed to rest upon; and with *Van Norman* v. *Young,* 228 Ill. 425, *and Kreitlein* v. *Ferger,* 238 Ill. 21, as to whom the burden of proof lies upon when a discharge in bankruptcy is pleaded; and with *Harris* v. *Piggly-Wiggly Stores,* 236 Ill. App. 392, *Woodward Iron Co.* v. *Finley,* 188 Ala. 634, and *Southern Railway Co.* v. *Weatherly,* 153 Ala. 171, as to what of allegation fails to charge wilful misconduct. And the Appellate Court did not heed nor follow the rule laid down in *Davis* v. *Aetna Acceptance Corporation,* 293 U. S. 328, where this Court reversed the Appellate Court of Illinois for the same error made in this case,—that of refusing to recognize a discharge in bankruptcy where there was a special finding that there was no intent to injure.

So we say the decision in this case is out of harmony with all well adjudicated cases and should not be permitted to stand unchallenged in judicial history.

Opposing counsel say, with reference to *In re Greene,* 87 Fed. (2d) 951, and the special interrogatory there answered by the jury, that defendant was guilty of wilful misconduct,—that that special verdict meant nothing in so far as determining whether the injuries sustained were wilful and malicious within the meaning of Section 17 of the National Bankruptcy Act. But an examination of that case shows that the Circuit Court of Appeals relied upon that finding confidently and we believe exclusively. In an effort to minimize the controlling influence of a special finding of wilfulness, counsel for respondent implies that we are contending that because a body execution might not issue on the judgment in this case because of the provision in the Amendment to the Judg-

ment Statute of 1935, that it is for that reason dischargeable in bankruptcy. Assuming to support that contention, opposing counsel quotes from the case of *Greene* v. *Noonan,* 372 Ill. 286, decided after the 1935 law was passed, to the effect that the rule still was that it was presumed where negligence and malice counts were both present, that a general verdict was based on the malice counts. An examination of *Greene* v. *Noonan* shows that the question there for decision was the effect of a general verdict rendered on negligence counts and wilful and wanton counts, where plaintiff had failed to support the wilful and wanton counts with proof; could the judgment stand, or must it be reversed. The high court reversed it. What was said in the quote at page 15 of respondent's brief was said in answer to an argument of plaintiff's counsel there, that the amendment to the Illinois Judgment Act permitted body executions only when it was specifically found that malice was the gist of the action. Having used the sentence quoted by opposing counsel, by way of argument or illustration, the Illinois Supreme Court then said:

> "This amendment to the Judgment Act has nothing to do with a presumption as to how a jury arrived at their verdict".

But while the Amendment of 1935 has no effect on the law of this case, it does emphasize the fact that now the rule as to insolvent debtors is the same as to bankrupts:— the judgment creditor must now show, when he wants a body *capias,* a judgment based specifically upon malice the same as a judgment creditor must show, as against a discharge in bankruptcy, a judgment record evidencing that it is for a liability for a wilful and malicious injury.

In his concluding remarks opposing counsel again say (page 17, Respondent's Brief) that the complaint adequately charges petitioner with "wilful, wanton, and ma-

licious misconduct and that the jury returned a general verdict of guilty on all charges." So we point out again that counsel has overdrawn his record. There is no charge of wilful, wanton and *"malicious"* misconduct. And opposing counsel goes on to say that "the evidence is presumed to have been adequate to support said charge", when, as we have shown, there was no evidence introduced as to liability.

It is therefore respectfully submitted that the brief of respondent Margaret Tharp shows no reason why this case should not be reviewed, but on the contrary it serves as an illustration of, and to emphasize a condition which this Court should take jurisdiction to clear up.

We therefore request the Court to issue the certiorari.

Respectfully submitted,

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